91-1718

(1)

No. 91-____

Supreme Court, U.S.
FILED
APR 28 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

HAMPTON TREE FARMS, INC. and SUNTIP CO.,
Petitioners

v.

EDWARD R. MADIGAN,
SECRETARY OF AGRICULTURE, et al,
and
THE UNITED STATES OF AMERICA,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JAMES H. CLARKE
COUNSEL OF RECORD

JOHN P. BLEDSOE
JOHN B. CROWELL, JR.
OF COUNSEL FOR PETITIONERS

LANE POWELL SPEARS LUBERSKY
800 Pacific Building
520 SW Yamhill Street
Portland, Oregon 97204-1383
Telephone: (503) 226-6151

April 1992

QUESTIONS PRESENTED

Question 1:

Whether a preliminary injunction, issued by a district court to preserve the *status quo* and subsequently dissolved for lack of subject matter jurisdiction, was void and without effect as to the parties' conduct before such dissolution.

Question 2:

Whether petitioners are in default under federal timber contracts when they applied and qualified for contract extensions after the time allowed by a Forest Service rule, but within the time allowed by and in reliance on an outstanding injunction between the parties in a case later determined to be beyond the subject matter jurisdiction of the district court.

THE PARTIES

Petitioners are Hampton Tree Farms, Inc., an Oregon corporation, and Suntip Co., an Oregon partnership. All stock of Hampton Tree Farms, Inc. is owned by Hampton Resources Inc., an Oregon corporation, all of whose stock is owned by Hampton Investment Company, an Oregon corporation.

Respondents are Edward R. Madigan, the incumbent Secretary of Agriculture; F. Dale Robertson, Chief, Forest Service, United States Department of Agriculture; John F. Butruille, the incumbent Regional Forester for Region 6, Forest Service; and the United States. In the court whose judgment is sought to be reviewed, the parties were the same, except that the then incumbent Secretary of Agriculture was Clayton Yeutter.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

THE PARTIES ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I This Court Should Define The Obligations And Rights Of Parties Based On Their Conduct In Response To And In Reliance On A Preliminary Injunction Which Is Subsequently Dissolved For Lack Of Subject Matter Jurisdiction. 8

II The Court Of Appeals Erred In Holding That A Preliminary Injunction Entered In A Case Over Which The District Court Lacked Subject Matter Jurisdiction Was A Nullity Prior To Its Dissolution, With The Result That The Injunction Need Never Have Been Obeyed. 9

III Petitioners Were Entitled To Rely On A Preliminary Injunction Issued To Preserve The Status Quo Whether Or Not The Issuing Court Had Jurisdiction Over The Underlying Controversy. 12

CONCLUSION 15

APPENDIX

Page

Opinion of Court of Appeals A-1

Opinion and Judgment of District Court in *Hampton* A-12

Subsequent Judgment of District Court in *Hampton* A-18

Judgment of District Court in *Suntip* A-24

Order Denying Petition for Rehearing A-29

Constitutional Provisions, Statutes and Regulations A-32

TABLE OF AUTHORITIES

Cases Page

Chicot County Drainage District v. Baxter State Bank,
308 U.S. 371 (1940) 12

Cooter & Gell v. Hartmarx Corp.
496 U.S. ___ (1990) 10

Howat v. Kansas,
258 U.S. 181 (1922) 9

In re Sawyer,
124 U.S. 200 (1881) 9

Littell v. Morton
369 F.Supp. 411 (Md. 1974) 14

Merrimack River Savings Bank v. City of Clay Center,
219 U.S. 527 (1911) 9

North Side Lumber Co. v. Block, (Or. 83-490-BU) 4

North Side Lumber Co. v. Block,
753 F.2d 1482 (9th Cir. 1985) 4

Scott & Fetzer Co. v. Dile
643 F.2d 670 (9th Cir. 1981) 9

Stoll v. Gottlieb,
305 U.S. 165 (1938) 13

Udall v. Littell,
366 F.2d 668 (D.C. Cir. 1966) 14

United States Catholic Conference v. Abortion Rights Mobilization,
487 U.S. 72 (1988) 9

United States v. Shipp,
203 U.S. 563 (1906) 9, 11

TABLE OF AUTHORITIES

Cases Page

United States v. United Mine Workers of America, 330 U.S. 258 (1947) 9

Willy v. Coastal Corporation, ___ U.S. ___, 60 L.W. 4187 (March 3, 1992) ... 10, 11

Worden v. Searls, 121 U.S. 14 (1887) 9

U.S. Const. Article I, Section 8 ..... 10, 11

16 U.S.C. §618(b)(1) 3

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 3

28 U.S.C. §1337 3

28 U.S.C. §1361 3

28 U.S.C. §2872 11

41 U.S.C. §609(a)(1) 6

48 Fed. Reg. 54814, December 7, 1983 4

Supreme Court Rule 13 2

F.R.C.P. 11 10

F.R.C.P. 59(e) 6

F.R.C.P. 65 11

F.R.C.P. 81(c) 11

Federal Timber Contract Payment Modification Act, Section 2(b)(1) (1984), 16 U.S.C. §618(b)(1) 3

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

HAMPTON TREE FARMS, INC. and SUNTIP CO.,
Petitioners

v.

EDWARD R. MADIGAN,
SECRETARY OF AGRICULTURE, et al,
and
THE UNITED STATES OF AMERICA,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Petitioners Hampton Tree Farms, Inc. and Suntip Co. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in these cases which were consolidated for review in that court.

OPINIONS BELOW

The opinion of the court of appeals is reported at ___ F.2d ___ (9th Cir. 1992) and is reprinted in the Appendix at page A-1.

The opinion of the district court on April 20, 1987 announcing its decision in the *Hampton* case has not been reported, and is reprinted in the Appendix hereto at page A-12. No opinions were issued by the district court when it entered judgment in the *Hampton* case on March 19, 1990 and in the *Suntip* case on May 7, 1990. The judgments are reproduced in the Appendix at pages A-18 and A-24.

JURISDICTION

In these consolidated cases, the court of appeals filed a memorandum decision and entered judgment on December 2, 1991. Petitioners timely filed a petition for rehearing on December 16, 1991 which was denied on January 30, 1992. On February 14, 1992 the court of appeals authorized publication and filed an amended opinion. On February 18, 1992 the court issued its mandate. This petition is filed within 90 days after January 30, 1992 and is timely under Rule 13. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The construction of no constitutional provisions, statutes or regulations is involved. Principal ones to which citation is made in this petition are set out in pertinent part in the Appendix.

STATEMENT OF THE CASE

This case began as two separate cases in the United States District Court for Oregon. They were consolidated for review by the court of appeals which reversed judgments of the district court. The district court had declared that timber contract buyers who applied and qualified for contract extensions after the time specified by a Forest Service rule, but within the time allowed by and in reliance on a preliminary injunction which the district court had entered in an earlier case between the parties to preserve the *status quo*, had not defaulted on their contracts because their applications for contract extensions were timely.

The district court had jurisdiction of these cases under 28 U.S.C. §1331, 28 U.S.C. §1337 and 28 U.S.C. §1361.

* * * * *

By 1983, many purchasers of Forest Service timber, including petitioners, were unable to operate their high-priced contracts, and the Forest Service, pursuant to a program approved and ordered by the President, made available 5-year contract extensions without interest during the extended period. It was a condition of such extensions that each purchaser should submit for Forest Service approval a plan to harvest its extended contracts during the extension period. These plans are commonly called Multi-Sale Extension Plans (MSEPs). The President's program provided for contract extensions after MSEP's were approved.

On October 16, 1984, the Federal Timber Contract Payment Modification Act, P.L. 98-478, 98 Stat. 2213-2217, became law. Section 2(b)(1), 16 U.S.C. 618(b)(1), of the Act ratified the MSEP program.

The deadline set by a rule promulgated by the Forest Service for filing applications for MSEP extensions was February 15, 1984, 48 Fed. Reg. 54814, December 7, 1983. On that date, however, the United States District Court for Oregon certified *North Side Lumber Co. v. Block,* (Or. 83-490-BU) as a class action to which petitioners were parties, and preliminarily enjoined the Forest Service from enforcing the February 15 deadline against members of the class, including petitioners. The injunction provided:

> "ORDERED that defendants in the above-entitled action and each of them are enjoined (1) from enforcing in any manner the contract (sic) at issue in this action held by the conditionally certified class members; (2) from enforcing the current February 15, 1984 deadline for the submission of a multi-sale extension plan by any of the conditionally certified class members that could include one or more of those timber sales in such a plan; and (3) to grant the members of plaintiffs' class 30 days following the dissolution of the preliminary injunction to submit and have considered by the Forest Service a five-year plan which could include one or more of the enumerated sales. This Order does not provide for any adjustment of contract dates."

A year later, on February 20, 1985 the court of appeals held in the *North Side* case that the district court lacked subject matter jurisdiction over the class members' claims. *North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir. 1985). Certiorari was denied, 474 U.S. 931 (1985), and the mandate of the court of appeals in *North Side* was issued on November 29, 1985. The district court received the mandate on December 2, 1985, and the injunction was dissolved.

However, in May 1985 petitioners had filed Multi-Sale Extension Plans and had applied for contract extensions.[1] In all respects, except for meeting the February 15, 1984 filing deadline, the Forest Service conceded that "as submitted, the plans met the stated requirements for an acceptable MSEP." (Hampton's Exhibit 24, p.2; Suntip's Exhibit 24, p.2.) Nevertheless, despite the injunction, the Forest Service refused over an extended period from May 1985 until the injunction was dissolved on December 2, 1985 to approve petitioners' MSEPs and grant them contract extensions. During this time the Forest Service granted similarly late-filed applications of two other purchasers, and throughout the period of the injunction granted limited contract extensions on a contract-by-contract basis in return for a purchaser's promise to harvest the timber. Hampton filed its complaint in this action on June 24, 1985.

In October 1985, before the *North Side* injunction was dissolved, the Forest Service offered a settlement to members of the *North Side* plaintiff class. Most class members had not filed MSEP applications and accepted the settlement. A number — including petitioners — did not, because they had made timely filings for contract extensions under the terms of the injunction then in effect, and because the settlement required them to waive their substantive claims in the *North Side* complaint. (Hampton's Exhibit 18, pp. 5-6; Suntip's Exhibit 18.)

Commencing in 1986, after the *North Side* injunction was dissolved, the Forest Service terminated the contracts of non-settling *North Side* plaintiffs, including petition-

---

[1] Petitioners refiled their MSEPs and applications within 30 days after the *North Side* injunction was dissolved to avoid the possibility that the injunction might be construed to allow such filings only within that 30 day period.

ers' contracts. The sole basis for the terminations was the agency's contention that the *North Side* injunction had always been a nullity, and that contracts for which extension applications had not been filed by February 15, 1984 were in default. If the contract extensions to which their timely filings of MSEPs entitled petitioners had been granted by the Forest Service, the contract expirations upon which the Forest Service grounds the alleged contract defaults would not have occurred.

Petitioners sought administrative review of these actions. The Regional Forester denied relief and, after no decision was forthcoming from the Chief,[2] petitioners sought judicial review, Hampton by amending its complaint in the case now here, and Suntip by filing its complaint in the case now here. By February 1990, when the district court decided the two cases, the Forest Service had resold all nine of Suntip's contracts and nine of Hampton's eleven contracts.[3]

In its judgments[4] the district court declared, as to matters material to this petition, that the preliminary

---

[2] The Chief, Forest Service, did not decide that petitioners' MSEP filings were untimely until May, 1989.

[3] The Forest Service chose not to resell Hampton's Erickson 8-79 and Blodgett contracts.

After receiving notices of damages claimed by the Forest Service for the alleged breaches of their contracts, both Hampton and Suntip, pursuant to Section 10 of the Contract Disputes Act of 1978, 41 U.S.C. §609(a)(1), initiated cases in the Claims Court with respect to the damage claims. Proceedings in those cases have been stayed pending final disposition of these cases.

[4] Final judgment in *Hampton* was entered on March 19, 1990. The court of appeals seems to have overlooked that judgment and instead reviewed the judgment entered April 27, 1987, which the Forest Service had sought to alter under F.R.C.P. 59(e). Final judgment in *Suntip* was entered May 7, 1990.

injunction in *North Side* was in full force and effect when petitioners filed their Multi-Sale Extension Plans with the Forest Service; that petitioners were entitled to extensions of their timber sale contracts subject to their Multi-Sale Extension Plans; that petitioners were not in default of those contracts; and that respondents had breached the contracts by terminating them.

The court of appeals reversed, holding that petitioners could claim nothing based on their conduct under the injunction prior to its dissolution, and that the Forest Service could properly treat their contracts as being in default. This was tantamount to holding that the Forest Service's enforcement of its administrative deadline while the injunction was in effect was lawful and should be rewarded.

The court of appeals said:

> "* * * Once an injunction in a civil case has been invalidated, rights granted under the injunction no longer exist and cannot be enforced." (At p.1533, *Slip Op.*)

> "* * * Hampton and Suntip cannot rely on the voided injunction to justify filing their MSEP plans after the February 15, 1984, deadline. Rather than seeking contract extensions in a timely fashion, they elected to take a chance on an invalid injunction. *** The district court had no authority to rewrite the Forest Service's MSEP to accommodate contractors who had rejected the MSEP deadline while waiting to see how the injunction fared on appeal." (At p.1534, *Slip Op.*)

REASONS FOR GRANTING THE WRIT

I This Court Should Define The Obligations And Rights Of Parties Based On Their Conduct In Response To And In Reliance On A Preliminary Injunction Which Is Subsequently Dissolved For Lack Of Subject Matter Jurisdiction.

These cases present two important and related questions. The first is whether a preliminary injunction issued in a case that is ultimately held to be beyond the district court's subject matter jurisdiction is, as the court of appeals concluded, a nullity that can be disregarded by a party even before the injunction is dissolved; the second is whether a party who relies on a preliminary injunction before it is dissolved for lack of jurisdiction can be in contract default for failing to comply with a procedural, administratively established deadline that the injunction had barred the agency from enforcing.

The cases here are of interest not only to the parties. The facts are uncommon, but they expose an underlying question of considerable importance. Injunctions of federal courts are not to be disregarded, particularly by federal agencies; a brighter and stricter line than the one now drawn is needed to protect persons who rely on and comply with a preliminary injunction subject to jurisdictional infirmity and, equally, to guide persons who are tempted or motivated to ignore or to treat such an injunction as a nullity.

If our judicial system is to operate justly and with certainty, litigants should know the civil consequences of obeying or defying injunctions that ultimately may be vacated for lack of jurisdiction. This Court heretofore has clearly ruled that a litigant may be punished for disobeying an injunction even though the jurisdictional basis of the

injunction remains subject to review. This Court has not yet decided whether a litigant may receive benefits from such disobedience by obtaining damages for breach of contract against another who relied upon the injunction and who would not have been in breach of contract had the injunction been honored.

II The Court Of Appeals Erred In Holding That A Preliminary Injunction Entered In A Case Over Which The District Court Lacked Subject Matter Jurisdiction Was A Nullity Prior To Its Dissolution, With The Result That The Injunction Need Never Have Been Obeyed.

An extra-jurisdictional preliminary injunction is not a nullity; it exists, it has consequences and effects, and violating it while it is still outstanding is a criminal contempt. *United States v. United Mine Workers of America*, 330 U.S. 258 (1947); *Howat v. Kansas*, 258 U.S. 181 (1922); *Merrimack River Savings Bank v. City of Clay Center*, 219 U.S. 527 (1911); *United States v. Shipp*, 203 U.S. 563 (1906).

The court of appeals was wrong as a matter of law in characterizing the *North Side* injunction as "invalid" and in suggesting that the injunction never had had any force or effect even as to conduct in reliance on it. *United Mine Workers, supra,* laid to rest the notion that an injunction entered without jurisdiction can be ignored or that action taken in reliance on its terms is without legal effect.[5] An injunction must be obeyed pending review. It is true that if an injunction is unauthorized, disobedience will not be penalized by leaving in place sanctions awarded to the party aggrieved by the disobedience. *Worden v. Searls*, 121 U.S. 14 (1887); *Scott & Fetzer Co. v. Dile*, 643 F.2d 670 (9th Cir. 1981); *see United States Catholic Conference v.*

---

[5] *See In re Sawyer*, 124 U.S. 200 (1881).

Abortion Rights Mobilization, 487 U.S. 72 (1988). But those cases do not require a conclusion that an overturned injunction is a nullity for all purposes.

It was the underlying issue of contract validity — not the collateral issue of procedures for obtaining or preserving the right to obtain contract extensions — that the *North Side* court held was beyond the district court's jurisdiction. A federal court has authority to deal with collateral matters that arise in litigation and these cases adjudicate the consequences of the *North Side* injunction independent of the issue of contract validity.

Earlier this term, the Court dealt with the question of a district court's jurisdiction to act on a matter collateral to the main case or controversy presented by a complaint. In *Willy v. Coastal Corporation*, ___ U.S. ___, 60 L.W. 4187 (March 3, 1992) the question was whether a district court had jurisdiction to impose Rule 11 sanctions against a lawyer and client even though the district court lacked subject matter jurisdiction over a removed case. This Court said:

> "A final determination of lack of subject matter jurisdiction of a case in a federal court, of course, precludes further adjudication of it. But such a determination does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction." *Willy v. Coastal Corporation*, ___ U.S. ___, 60 L.W. 4187, 4189 (1992). *See also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___ (1990).

The Court concluded in *Willy* that, regardless of the jurisdictional decision, the district court had power to impose sanctions derived from the authority given Congress in Article I, Section 8 to establish inferior courts

and make laws necessary to implement that grant. The Federal Rules of Civil Procedure, promulgated under the Rules Enabling Act, 28 U.S.C. §2072, apply to removed civil actions. Rule 81(c). There is, therefore, a jurisdictional basis to impose sanctions independent of subject matter jurisdiction of the underlying case or controversy.

In *North Side*, the district court's issuance of the preliminary injunction did not lie "outside the range of action constitutionally permitted to an Article III Court."[6] The district court's jurisdiction to issue the preliminary injunction did not depend on the presence of subject matter jurisdiction over the underlying case or controversy; instead, such jurisdiction rested separately either on Rule 65 of the Federal Rules of Civil procedure under the constitutional grant of power, Article I, Section 8, or on inherent power necessarily vested in a federal court to preserve the *status quo* while the court's jurisdiction over the *North Side* case or controversy was being determined. *United States v. Shipp, supra,* at 573. Either way, the *North Side* injunction was not invalid, nor was it void.

Thus the court of appeals erred in measuring respondents' duty in these cases to perform obligations imposed by the *North Side* injunction based on the court's earlier determination of the district court's jurisdiction over the merits of *North Side*. The Forest Service **never** sought interim relief from the *North Side* injunction so as to limit the period of the injunction's effectiveness. Instead, the Forest Service chose the lawless path of ignoring the injunction, enforcing the deadline set by the Forest Service rule, and withholding contract extensions to which petitioners' timely MSEP filings entitled them.

The consequence of the two holdings by the court of

---

[6] The quotation is from *Willy, supra* at 4188.

appeals — first, in *North Side,* that the case or controversy there presented was beyond the district court's subject matter jurisdiction, and second, in these cases, that the *North Side* injunction therefore was a nullity *ab initio* — is to permit the Forest Service to refuse to obey the injunction while it was in force, declare a default, and terminate petitioners' contracts with utterly disastrous consequences to petitioners.

III Petitioners Were Entitled To Rely On A Preliminary Injunction Issued To Preserve The Status Quo Whether Or Not The Issuing Court Had Jurisdiction Over The Underlying Controversy.

The injunction in *North Side* was issued to preserve the parties' rights to apply for contract extensions under administrative procedures pending a determination of the validity of the contracts. Petitioners filed their applications for contract extensions within the time the injunction allowed and while the injunction was still in being. Throughout that period the Forest Service was prohibited by the injunction from enforcing the administratively established time limit prescribed by a Forest Service rule and was required to accept conforming MSEPs filed after that date.

The result of the court of appeals decision in these cases is not only unfair to petitioners, but adversely affects proper administration of the law. Thus, the court of appeals decision is inconsistent with decisions of this Court recognizing rights created by reliance on seemingly valid rules. In *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), this Court considered the relationship between parties one of whom had acted in reliance on a federal statute that was subsequently held to be unconstitutional. The Bank sought to enforce payment of certain bonds, despite a court decree based on

a statute providing for substitute obligations. The lower courts ruled in favor of the Bank; yet, this Court held that the earlier decree was *res judicata*.

> "The actual existence of a statute, prior to (a determination of unconstitutionality) is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed that become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and its previous application, demand examination. *** [I]t is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."[7]

---

[7] *See also Stoll v. Gottlieb*, 305 U.S. 165 (1938) where stockholders in a bankrupt corporation had conveyed their stock to a successor corporation in reliance on an order of the bankruptcy court relieving them of their obligations as guarantors of the bankrupt's debt. The bankruptcy court rejected a challenge by a beneficiary of the guaranty to the bankruptcy court's authority to relieve the stockholders of their guaranty obligation. The beneficiary of the guaranty thereafter tried to enforce the guaranty in an Illinois court. On review, this Court assumed that the bankruptcy court lacked power to relieve the guarantors of their obligations, but held that the unappealed determination of the original challenge in the bankruptcy court was *res judicata*, and the guarantors had properly relied on the bankruptcy court adjudication.

Littell v. Morton, 369 F. Supp. 411 (Md. 1974), affirmed without opinion, 519 F.2d 1399 (4th Cir. 1975), is indistinguishable in principle from the two cases here and demonstrates the conclusion that this Court should adopt as the governing rule for the federal courts. In *Littell*, the general counsel of the Navajo tribe had obtained an injunction to prevent the tribe and the Secretary of the Interior from terminating his contract to provide legal services. The Court of Appeals for the District of Columbia Circuit invalidated that injunction, *Udall v. Littell*, 366 F.2d 668 (D.C. Cir. 1966). But while the injunction had been in force, the general counsel had performed legal services for the tribe in accordance with the contract. In a subsequent case before the district court for Maryland, brought to recover the contract value of those services, the court awarded fees for the services performed in accordance with the contract while the injunction was in force, thereby giving effect to obligations created against the enjoined party by the injunction upon which plaintiff had relied. The fact that the injunction issued in the earlier *Littell* litigation was invalidated other than for lack of subject matter jurisdiction is immaterial; once a federal court injunction comes into being, the benefited party should be allowed to act in reliance on it without reservation.

The facts of the cases consolidated here present the issues clearly and afford the Court opportunity to define rights and obligations in similar cases for the benefit of future litigants and for the guidance of federal courts hearing their causes.

CONCLUSION

The decision of the court of appeals in these cases conflicts with applicable decisions of this Court and adversely affects sound judicial administration. The decision incorrectly resolves important and unresolved questions of federal judicial power. Consequently the petition should be granted.

Respectfully submitted,

JAMES H. CLARKE
Counsel of Record

JOHN P. BLEDSOE
JOHN B. CROWELL, JR.
Counsel for Petitioners

Lane Powell Spears Lubersky
800 Pacific Building
520 S.W. Yamhill Street
Portland, Oregon 97204-1383
Telephone: (503) 226-6151

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAMPTON TREE FARMS, INC.,	)	No. 90-35443
Plaintiff-Appellee	)	D.C. No. CV-85-1085BU
v.	)	
CLAYTON K. YEUTTER, Secretary of the United States Department of Agriculture; F. DALE ROBERTSON, Chief, Forest Service, JOHN F. BUTRUILLE, Regional Forester for Region 6, Forest Service, United States Department of Agriculture; and the UNITED STATES OF AMERICA,	)	
Defendants-Appellants	)	

SUNTIP CO., an Oregon partnership,	)	No. 90-35509
Plaintiff-Appellee,	)	D.C. No. CV-87-136BU
v.	)	ORDER AND OPINION
CLAYTON YEUTTER, Secretary of the United States Department of Agriculture; F. DALE ROBERTSON, Chief Forest Service, United States Department of Agriculture; JOHN F. BUTRUILLE, Regional Forester for Region 6, Forest Service, United States Department of Agriculture; UNITED STATES OF AMERICA,	)	
Defendants-Appellants	)	

OPINION

GOODWIN, Circuit Judge:

The Forest Service appeals summary judgment for two timber companies seeking extensions of defaulted contracts to purchase Forest Service timber. The Forest Service had denied their applications as untimely. We reverse.

These actions arise out of difficulties experienced by appellees Hampton Tree Farms, Inc. ("Hampton") and Suntip Co. ("Suntip") in fulfilling their contracts with the Forest Service to purchase timber. In the late 1970's, purchasers bid up the price of government timber for future cutting. Many, including Hampton and Suntip, entered into purchasing contracts which locked them into high prices. After the economic downturn of the early 1980's, many of these companies faced substantial losses in meeting their contractual obligations.

In response to Congressional pressure, the Forest Service adopted the "Multi-Sale Extension Policy" (MSEP). The MSEP granted those timber companies which chose to participate a five-year extension for completing their contracts. In return, the companies forfeited eligibility for any additional contract extensions and accepted certain modifications of their contracts.

The final version of the MSEP was published in the Federal Register on December 7, 1983. It required the companies wishing to participate in the program to submit a plan to the Forest Service by February 15, 1984. 48 Fed. Reg. 54812, 54814 (1983).

Hampton and Suntip chose not to submit MSEP plans in accordance with the February 15, 1984, deadline. Instead, they chose to rely on a district court injunction then on appeal. North Side Lumber Co. v. Block, No. 83-490, slip op. (D. Or. Feb. 15, 1984). In North Side, the plaintiff class of timber companies was seeking a judicial remedy for the economic problem addressed by the MSEP. The timber companies claimed that it had become commercially impracticable to perform their contracts. They requested that the district court allow them to rescind the contracts and enjoin the Forest Service from enforcing them.

On February 15, 1984, the North Side district court issued a preliminary injunction which ordered the Forest Service not to enforce its contracts with members of the plaintiff class. It also enjoined enforcement of the February 15, 1984, deadline for submitting MSEP plans. The injunction required the Forest Service to allow class members 30 days following dissolution of the preliminary injunction "to submit and have considered by the Forest Service" MSEP plans. North Side, slip op. at 2.

On February 20, 1985, this court reversed that injunction, holding that the district court lacked jurisdiction over the plaintiffs' contract claims. North Side Lumber Co. v. Block, 753 F.2d 1482 (9th Cir. 1985). Due to delays related to petitions for rehearing and for certiorari, this court's mandate in North Side did not issue until November 28, 1985. The district court received the mandate on December 2, 1985. The parties agree that the injunction was dissolved upon the district court's receipt of the mandate.

In May 1985, while the injunction was still in effect, both Hampton and Suntip submitted MSEP plans for Forest Service approval. Both re-submitted their plans in December, within 30 days of the injunction's dissolution.

In 1986 and 1987, the Forest Service informed Hampton and Suntip that they had not met the performance deadlines in their contracts and that the contracts were terminated. The Forest Service refused to accept their MSEP plans, because the plans were filed after the original February 15, 1984, deadline. Hampton and Suntip then filed the suits which are the subject of the present appeals.

In each of their cases, the district court granted Hampton and Suntip summary judgment, ordering the

Forest Service to approve their MSEP plans. Hampton Tree Farms, Inc. v. Block, No. 85-1085 (D. Or. April 20, 1987); Suntip Co. v. Yeutter, No. 87-1360 (D. Or. May 10, 1990). Because Hampton and Suntip had filed their MSEP plans while the injunction was still in effect, the court ruled that the filings had been timely.

In Hampton's case, the court also ruled that the Forest Service's rejection of its application was "seemingly arbitrary." Hampton, slip op. at 2.

In Suntip's case, the court ruled that, in refusing to consider late-filed MSEP applications, the Forest Service had changed, without proper administrative procedure, the rule it had adopted in compliance with the North Side injunction. In that case, the court also ruled that the Forest Service was estopped from denying the "full force and effectiveness" of the injunction. Suntip, slip op. at 2-3.

The Forest Service appeals these rulings.

I. Retroactive Enforcement of the Void Injunction

The Forest Service argues that in issuing judgment for Hampton and Suntip, the district court was retroactively enforcing a void injunction. Hampton and Suntip argue that while the injunction was valid, they

had acquired and exercised the right to file their MSEP plans late. In granting them summary judgment, they argue, the district court was merely enforcing these existing rights.

In Scott & Fetzer Co. v. Dile, 643 F.2d 670 (9th Cir. 1981), the district court imposed civil contempt sanctions against a party who had disobeyed an injunction. At the time the court imposed the sanctions, the injunction was in full force. On appeal, this court overturned the injunction. In addition, we reversed the award of sanctions.

In reaching this conclusion, this court relied on United States v. United Mine Workers of America, 330 U.S. 258 (1947). Scott & Fetzer, 643 F.2d at 675. In United Mine Workers, the Supreme Court held that "[t]he right to remedial relief falls with an injunction which events prove was erroneously issued." 330 U.S. at 295.

[1] The lesson of these cases is that once an injunction in a civil case has been invalidated, rights granted under the injunction no longer exist and cannot be enforced.[1] See also Latrobe Steel Co. v. United

---

[1] For the purposes of this rule, United Mine Workers and its progeny distinguish civil from criminal contempt. Criminal contempt sanctions survive an injunction that is later invalidated because their purpose is to uphold the authority of the court.

Steelworkers of America, AFL-CIO, 545 F.2d 1336, 1346 (3d Cir. 1976) ("The United Mine Workers doctrine . . . recognizes that a private party should not profit as a result of an order to which a court determines, in retrospect, he was never entitled."); Sandler v. Tarr, 345 F. Supp. 621-22 (D. Md. 1971) ("An order issued without jurisdiction is null and void - it never existed . . . [R]elief may [not] be based on the fact that the order had existed at an earlier time.") aff'd, 463 F.2d 1096 (4th Cir. 1972).

Hampton and Suntip argue that Littell v. Morton, 369 F. Supp. 411 (D. Md. 1974) suggests a contrary rule. In Littell, the general counsel of the Navajo Tribe had previously obtained an injunction preventing the tribe from firing him. The fourth circuit overturned that injunction. While the injunction was still in force, however, the general counsel had performed legal services for the tribe. At trial, the district court awarded the general counsel fees for these services. Id. at 415.

The Littell court justified its award on a theory of restitution. As restitution, the court treated the award as a matter within the discretion of the court, and not as the enforcement of a right. Id. at 419. Littell does not support Hampton and Suntip.

[2] Applying the United Mine Workers principles to this case, Hampton and Suntip cannot rely on the voided injunction to justify filing their MSEP plans after the February 15, 1984, deadline. Rather than seeking contract extensions in a timely fashion, they elected to take a chance on an invalid injunction. Hampton and Suntip now seek to improve their position by relying on an option that has long since been extinguished. The district court had no authority to rewrite the Forest Service MSEP to accommodate contractors who had rejected the MSEP deadline while waiting to see how the injunction fared on appeal.

II. Change of Rules

In Suntip, the district court held that "policies of the Forest Service adopted after issuance of the North Side injunction adapting to the existence of the injunction were not thereafter changed in accordance with requirements of law, thereby rendering unenforceable any changes to such policies otherwise attempted." Suntip, slip op. at 2-3. Underlying this holding is the assumption that, in complying with the injunction, the Forest Service had adopted an agency rule. This assumption is incorrect.

In Angle v. United States, 709 F.2d 570 (9th Cir. 1983), the Secretary of the Interior had promulgated regulations establishing a deadline of September 22,

1969, by which certain Native Americans could apply to receive land shares. The deadline was established by regulation and was published in the Federal Register. Id. at 571. In September and October of 1970, the Secretary issued a memorandum authorizing area directors to accept applications filed after the deadline. The Secretary never published in the Federal Register a notice that it had amended the original rule. In February 1971, the Secretary circulated a second memorandum, ordering area directors to cease accepting late applications. Those who filed applications after February 1971 sued, claiming that the Secretary had improperly refused to accept their applications. This court held that the original deadline was the only binding agency rule. Neither memorandum had been issued in accord with proper rulemaking procedures. Thus, neither had become an agency rule. Id. at 577.

[3] In this case, the Forest Service published the February 15, 1984, deadline in the Federal Register, after first soliciting public comment on the MSEP program. See 48 Fed. Reg. 38862, 38862-64 (Aug. 26, 1983); 48 Fed. Reg. 54812, 54814 (Dec. 7, 1983). The February 15, 1984, deadline was the only one ever published in the Federal Register. Thus, the Forest Service's rejection of Hampton's and Suntip's MSEP plans due to lateness could not have been the result of an improperly created or modified agency rule.

III. Arbitrary and Capricious Actions

[4] Hampton and Suntip argue that the Forest Service acted arbitrarily and capriciously in approving late-filed MSEP plans of other similarly situated purchasers, while rejecting their plans. During the original class-action suit underlying this case, the Justice Department offered to grant, and did grant, MSEP approvals to class members who settled. Hampton and Suntip chose not to accept the settlement offer. Under these facts, the actions of the Forest Service were neither arbitrary nor capricious.

IV. Estoppel

[5] In Suntip's case, the district court held that "defendants are estopped from denying the full force and effectiveness of the North Side injunction." Suntip, slip op. at 2. Because the North Side injunction was issued without jurisdiction and was held on appeal to be void, we need not decide what relevance, if any, the doctrine of estoppel bears to this case.

REVERSED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HAMPTON TREE FARMS, INC.,	)	
Plaintiff,	)	CIVIL No. 85-1085 Bu
v.	)	
JOHN R. BLOCK, Secretary of the United States Department of Agriculture, et al.,	)	OPINION AND ORDER
Defendant.	)	

[U.S. District Court
District of Oregon
Filed April 20, 1987
Robert M. Christ, Clerk]

Plaintiff Hampton Tree Farms, Inc. (Hampton) moves for summary judgment in its favor as to its claims for declaratory and injunctive relief. Specifically, Hampton seeks approval of its Multi-Sale Extension Plan (MSEP) filed with the United States Forest Service on May 13, 1985. The Government has countered with a motion to dismiss for lack of subject matter jurisdiction. The Government also contends that Hampton's MSEP was untimely filed. For the reasons briefly set forth below, I grant Hampton's motion for summary judgment and order the Forest Service to accept Hampton's MSEP.

Background

The Government does not dispute Hampton's statement of the facts in this case.

Hampton has entered into a number of timber sale contracts with the Forest Service. In April, 1983, plaintiff and a number of other wood products companies brought suit to invalidate, on several grounds, certain timber sale contracts with the Forest Service. On December 7, 1983, the Forest Service announced the Multi-Sale Extension Program. The program is designed to help remedy the depression in the forest products industry by granting five-year interest free extensions of

time for performance of timber sale contracts on condition that the contract purchasers agree to a number of modified contractual provisions, including provisions covering road construction, harvesting schedules and remedies for default.

On February 15, 1984, I granted a preliminary injunction in the above mentioned action. North Side Lumber Co. et al. v. Block, Civil No. 83-490. I enjoined the Forest Service from enforcing the then current February 15, 1984 deadline for the submission of a MSEP by any of the North Side class members.

On May 9, 1985, Hampton presented to the Forest Service its MSEP. The plan was reviewed by Forest Service representatives who suggested that Hampton make certain corrections. The corrected MSEP was duly filed on May 13, 1985. The Forest Service found the information to be "correct" and an otherwise acceptable plan, but refused to approve the plan in light of a directive from Wendall L. Jones, Director of Timber Management for the Forest Service, prohibiting approval of any MSEP filed by a North Side class member "due to the uncertainties of the current court action." During this time, however, timber companies who were not members of the North Side class did have MSEPs approved by the Forest Service.

Upon appeal by the Government, the Court of Appeals vacated the injunction because I "did not have jurisdiction of the cause in action [an impracticability of the contract claim] on which the [injunction] was based." North Side Lumber v. Block, 753 F.2d 1482, 1483 (9th Cir. 1985). The United States Supreme Court denied plaintiffs'/petitioners' writ of certiorari, North Side Lumber Co. v. Block, __ U.S., __, 106 S.Ct. 4 (1985), and the injunction was dissolved in November, 1985.

Discussion

Hampton moves for summary judgment and requests that this court order the Forest Service to approve the MSEP. The Government contends that this court lacks jurisdiction and, even if jurisdiction exists, Hampton's MSEP was untimely filed.

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the burden of establishing the absence of a genuine issue of material fact. Western Federal Corp. v. Erickson, 739 F.2d 1439, 1442 (9th Cir. 1984). In the present case, the facts are not disputed and the only task remaining is to determine whether Hampton is entitled to prevail as a matter of law.

A. Jurisdiction

The Government contends that Hampton's claim is founded upon a contract, and therefore, falls within the ambit of the Tucker Act. 28 U.S.C. §§ 1346 and 1491. The Government's jurisdictional argument is squarely foreclosed by the Ninth Circuit's decision in North Side Lumber. The Tucker Act does not preclude review of agency action when the relief sought is other than money damages. Id. at 1485. This court has jurisdiction over claims, even though they are "contract related" so long as the claims rest "at bottom on statutory rights." Id.

Hampton's right to have its MSEP considered flows from a program authorized and directed by the President and implemented by the Forest Service on July 28, 1983. This program was ratified by the Federal Timber Contract Modification Act, 16 U.S.C. § 618. Hampton's claim, which does not seek money damages, rests "at bottom on statutory rights." I have jurisdiction over this claim.

I have been unable to find any valid justification for the Forest Service's discrimination against the MSEPs filed by North Side class members, including Hampton. The Forest Service should be required to carry out the MSEP policy in compliance with the Administrative

Procedures Act. 5 U.S.C. § 702. The record indicates that Hampton's MSEP would have been approved but for Mr. Jones' seemingly arbitrary directive. I therefore order that Hampton's MSEP be accepted and approved by the Forest Service unless there is some reasonable justification for not doing so independent of Hampton's membership in the North Side class.

B. Timeliness of Filing

Hampton filed its MSEP with the Forest Service on May 13, 1985. The February 15, 1984 injunction was dissolved in November, 1985. Therefore, Hampton's MSEP was timely filed.

Conclusion

For the reasons stated above, I find that I have jurisdiction over this case and I order that the United States Forest Service shall accept and approve Hampton's Multi-Sale Extension plan.

IT IS SO ORDERED.

DATED this 20 day of April, 1987

/s/James M. Burns
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HAMPTON TREE FARMS, INC., an Oregon Corporation,	)
Plaintiff,	)
v.	) CIVIL No. 85-1085-Bu
CLAYTON K. YEUTTER, Secretary of the United States Department of Agriculture; F. DALE ROBERTSON, Chief, Forest Service; JOHN BUTRUILLE Regional Forester for Region 6, Forest Service, United States Department of Agriculture; and the UNITED STATES OF AMERICA,	) JUDGMENT
Defendants,	)

A-19

[U.S. District Court
District of Oregon
Filed March 19, 1990
Robert M. Christ, Clerk]

This cause came on regularly for hearing on defendants' Motion to Alter the Court's Judgment entered April 27, 1987, on plaintiff's Renewed Motion for Summary Judgment, and on defendants' Cross Motion for Summary Judgment before the Honorable James M. Burns. John P. Bledsoe and John B. Crowell, Jr. appeared as attorneys for plaintiff, and Gary B. Randall and Pamela A. Piech appeared as attorneys for defendants.

The court, having heard arguments of counsel and examined the briefs and the proofs offered by the respective parties, and having determined and having been orally assured by the parties at the hearing that there are no material facts in dispute,

HEREBY ORDERS, ADJUDGES, DECLARES AND DECREES:

1. That defendants' rule 59(e) Motion to Alter Judgment is denied.

2. That defendants' Cross Motion for Summary Judgment is denied.

3. That plaintiff's Motion for Summary Judgment is granted.

4. That the Preliminary Injunction issued by this court on February 15, 1984 in North Side Lumber Co. etal.v.John Block et al. CivilNo. 83-490-BU ("the North Side injunction") was in full force and effect at the times plaintiff filed its Multi-Sale Extension plan with the Forest Service.

5. That policies of the Forest Service adopted after issuance of the North Side injunction adapting to the existence of the injunction were not thereafter changed in accordance with requirements of law, thereby rendering unenforceable any changes to such policies otherwise attempted.

6. That defendants are estopped from denying the full force and effectiveness of the North Side injunction.

7. That plaintiff was entitled to extensions of its timber sale contracts subject to plaintiff's Multi-Sale Extension Plan.

8. That plaintiff is not in default of any contracts so entitled to be extended.

9. That by terminating plaintiff's timber sale contracts defendants have breached those contracts.

10. That termination or resale of plaintiff's timber sale contracts entitles plaintiff to cancel such contracts.

11. That plaintiff was unlawfully barred from bidding at the resale of its said contracts.

12. That plaintiff is not required, as a consequence of its non-performance of the timber sale contracts included in its multi-sale extension plan and not bought out, to post security for performance of contracts awarded it in any amount greater than provided in the applicable timber sale prospectus.

13. That plaintiff is entitled to release of such security as plaintiff has heretofore posted in amounts greater than required by the prospectus under which the timber contract was advertised.

14. That defendants, for the reasons established by the declarations in paragraph 4 through 13 above, be and hereby are prohibited from:

A. Requiring plaintiff, as a result of not having performed any of the contracts listed in plaintiff's Multi-Sale Extension Plan and as a condition of being awarded any national forest timber contract, to post security in amount greater than would be required of any other purchaser of such contract who had not been alleged to have defaulted on any contract for purchase of national forest timber.

B. Retaining security posted by plaintiff, for performance of any contract heretofore awarded to plaintiff, in amount greater than the amount of security stated by the prospectus under which the contract was advertised as required of any purchaser not alleged to have defaulted on any Forest Service timber contract.

15. That plaintiff recover from defendants the costs and disbursements of plaintiff incurred herein.

DATED at Portland, Oregon this 19th day of March, 1990.

/s/James M. Burns
United States District Court Judge

Presented by:

/s/John P. Bledsoe
/s/John B. Crowell, Jr.
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SUNTIP CO., an Oregon Partnership,	)
Plaintiff,	)
v.	) CIVIL No. 87-1360-BU
CLAYTON YEUTTER, Secretary of the United States Department of Agriculture; F. DALE ROBERTSON, Chief, Forest Service, United States Department of Agriculture; JOHN F. BUTRUILLE, Regional Forester for Region 6, Forest Service, United States Department of Agriculture; and the UNITED STATES OF AMERICA,	) JUDGMENT
Defendants,	)

[U.S. District Court
District of Oregon
Filed May 7, 1990
Donald M. Cinnamond, Clerk]

This cause was submitted to the court on plaintiff's Motion for Summary Judgment, and on defendants' Cross Motion for Summary Judgment.

John P. Bledsoe and John B. Crowell, Jr., as attorneys for plaintiff, and Gary B. Randall and Pamela A. Piech, as attorneys for defendants, appeared before the Honorable James M. Burns at a status conference held February 14, 1990 contemporaneously with the Court's hearing of summary judgment motions in Hampton Tree Farms, Inc. v. Clayton K. Yeutter, et al., Civil No. 85-1085-BU. The parties then represented to the Court that there are no material facts in dispute in this case and that legal principles covered by briefs filed in the Hampton case cited above are applicable to this cause.

The court, having examined the proofs offered by the respective parties, having determined that the Court has jurisdiction both over the subject matter and of the parties, and that there are no material facts in dispute, HEREBY ORDERS, ADJUDGES, DECLARES AND DECREES:

1. That Defendants' Cross Motion for Summary Judgment is denied.

2. That Plaintiff's Motion for Summary Judgment is granted.

3. That the Preliminary Injunction issued by this court on February 15, 1984 in North Side Lumber Co. et al. v John Block et al. Civil No 83-490-BU ("The North Side injunction") was in full force and effect at the times plaintiff filed its Multi-Sale Extension Plan with the Forest Service.

4. That policies of the Forest Service adopted after issuance of the North Side injunction adapting to the existence of the injunction were not thereafter changed in accordance with requirements of law, thereby rendering unenforceable any changes to such policies otherwise attempted.

5. That defendants are estopped from denying the full force and effectiveness of the North Side injunction.

6. That plaintiff's Multi-Sale Extension Plan was timely filed.

7. That plaintiff's multi-Sale Extension Plan was in compliance with rules pertaining thereto at the times of filing.

8. That plaintiff's Multi-Sale Extension Plan as filed was entitled to be approved and that the decision of the Chief of the Forest Service to the contrary is hereby reversed and vacated.

9. That plaintiff was entitled to extensions of its timber sale contracts subject to plaintiff's Multi-Sale Extension Plan.

10. That plaintiff is not in default of any contracts so entitled to be extended.

11. That by terminating plaintiff's timber sale contracts defendants have breached those contracts.

12. That termination or resale of plaintiff's timber sale contracts entitles plaintiff to cancel such contracts.

13. That plaintiff was unlawfully barred from bidding at the resale of its said contracts.

14. That plaintiff is not required, as a consequence of its non-performance of the timber sale contracts included in its multi-sale extension plan and not bought out, to post security for performance of contracts awarded it in any amounts greater than provided in the applicable timber sale prospectus.

15. That plaintiff recover from defendants the costs and disbursements of plaintiff incurred herein.

DATED at Portland, Oregon this 7th day of May, 1990

/s/ James M. Burns
United States District Court Judge

Presented by:

/s/ John P. Bledsoe
/s/ John B. Crowell, Jr.
Attorneys for Plaintiff

NOT FOR PUBLICATON

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAMPTON TREE FARMS, INC.,	)	No. 90-35443
Plaintiff-Appellee	)	D.C.No.CV-85-1085BU
v.	)	ORDER
CLAYTON K. YEUTTER, Secretary of the United States Department of Agriculture; F. DALE ROBERTSON, Chief, Forest Service, JOHN F. BUTRUILLE, Regional Forester for Region 6, Forest Service, United States Department of Agriculture; and the UNITED STATES OF AMERICA, Defendants-Appellants	)	

SUNTIP CO., an Oregon partnership,	)	No. 90-35509
Plaintiff-Appellee,	)	D.C.No.CV-87-136BU
v.	)	
CLAYTON YEUTTER, Secretary of the United States Department of Agriculture; F. DALE ROBERTSON, Chief, Forest Service; JOHN F. BUTRUILLE, Regional Forester for Region 6, Forest Service, United States Department of Agriculture; UNITED STATES OF AMERICA,	)	
Defendants-Appellants	)	

A-31

[Filed
January 30, 1992
Cathy A. Catterson,Clerk
U.S. Court of Appeals]

Before: GOODWIN, ALARCON and HALL Circuit Judges.

The Petition for rehearing is DENIED.

Constitutional Provisions, Statutes and Regulations

Article I, Section 8 of U.S. Constitution:

> "The Congress shall have Power * * *
> To Constitute Tribunals inferior to the Supreme Court; * * * And
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof."

16 U.S.C., § 618(b) (Federal Timber Contract Payment Modification Act):

> "(1) Timber contracts bid prior to January 1, 1982, not bought out pursuant to subsection (a) and included in the President's program of July 28, 1983, shall not be subject to any further extension of time for performance except as permitted under the President's program of July 28, 1983, as implemented by the Secretary of Agriculture and the Secretary of the Interior, providing for the extension of certain timber sale contracts and requiring the phased harvesting of such extended contracts, which program is hereby ratified except as modified by paragraph (2).
>
> "(2) Notwithstanding any other provisions of law, timber contracts extended pursuant to the President's program of July 28, 1983, as implemented by the Secretary of Agriculture shall not be subject to inclusion of additional provisions for calculating damages for default.

48 Federal Register, No. 236, December 7, 1983, 54812-54818:

Department of Agriculture, Forest Service, 36 C.F.R., Part 223, Extension of Certain Timber Sale Contracts Adoption of Final Policy * * *

At p. 54814:

4. Submittal Date

"* * * Therefore, purchasers will have until February 15, 1984 to submit their plans to the Forest Service."

(2)

Supreme Court, U.S.
FILED
JUN 30 1992
OFFICE OF THE CLERK

No. 91-1718

In the Supreme Court of the United States

OCTOBER TERM, 1992

HAMPTON TREE FARMS, INC. AND SUNTIP CO., PETITIONERS

v.

EDWARD R. MADIGAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROGER CLEGG
Acting Assistant Attorney General

JOHN A. BRYSON
DIRK D. SNEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, in these actions against the Forest Service, petitioners may enforce a preliminary injunction that was entered in a prior action but vacated on appeal for lack of subject matter jurisdiction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Block v. *North Side Lumber Co.*, 473 U.S. 1307 (1985)	4
Bohemia, Inc. v. *Block*, 474 U.S. 919 (1985)	3-4
Chicot County Drainage Dist. v. *Baxter State Bank*, 308 U.S. 371 (1940)	13
Cooter & Gell v. *Hartmarx Corp.*, 110 S. Ct. 2447 (1990)	11, 12
Establishment Inspection of Hern Iron Works, Inc., In re, 881 F.2d 722 (9th Cir. 1989)	10-11
Gompers v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911)	9, 10, 11
Gregory v. *Tarr*, 436 F.2d 513 (6th Cir.), cert. denied, 403 U.S. 922 (1971)	9
Littell v. *Morton*, 369 F. Supp. 411 (D. Md. 1974), aff'd, 519 F.2d 1399 (4th Cir. 1975)	13
North Side Lumber Co. v. *Block*, 474 U.S. 931 (1985)	4
North Side Lumber Co. v. *Block*, 753 F.2d 1482 (9th Cir. 1985), certs. denied, 474 U.S. 919 and 474 U.S. 931 (1985)	3, 13
OPM v. *Richmond*, 110 S. Ct. 2465 (1990)	14
Pasquier v. *Tarr*, 444 F.2d 116 (5th Cir. 1971)	10
Providence Journal Co., In re, 820 F.2d 1342 (1st Cir. 1986), cert. dismissed, 485 U.S. 693 (1988)	11
Sandler v. *Tarr*, 345 F. Supp. 612 (D. Md. 1971), aff'd, 463 F.2d 1096 (4th Cir.), cert. denied, 409 U.S. 990 (1972)	9-10

Cases—Continued: Page

Sierra Pacific Indus. v. *Block*, 643 F. Supp. 1256 (N.D. Cal. 1986), aff'd in part, rev'd in part, 866 F.2d 1099 (9th Cir. 1989) 2
Stoll v. *Gottlieb*, 305 U.S. 165 (1938) 13
Tekkna Laboratories, Inc. v. *Perales*, 933 F.2d 1093 (2d Cir. 1991) 9
United Elec. Workers v. *163 Pleasant Street Corp.*, 960 F.2d 1080 (1st Cir. 1992) 9
U.S. Catholic Conference, In re, 885 F.2d 1020 (2d Cir. 1989), cert. denied, 495 U.S. 918 (1990) 9, 10
United States v. *Shipp*, 203 U.S. 563 (1906) 11
United States v. *United Mine Workers*, 330 U.S. 258 (1947) 8, 10, 11, 12
United States Catholic Conference v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) 8-9, 11
Willy v. *Coastal Corp.*, 112 S. Ct. 1076 (1992) 9, 10, 11-12, 13
Zeilstra v. *Tarr*, 466 F.2d 111 (6th Cir. 1972) 9

Statutes, regulation and rule:

National Forest Management Act of 1976, 16 U.S.C. 472a 2
28 U.S.C. 1346(a)(2) (Little Tucker Act) 3
36 C.F.R. Pt. 223 2
Fed. R. Civ. P. 11 12

Miscellaneous:

48 Fed. Reg. (1983):
p. 54,812 2
p. 54,814 2

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1718

HAMPTON TREE FARMS, INC. AND SUNTIP CO., PETITIONERS

v.

EDWARD R. MADIGAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 956 F.2d 869. The opinion (Pet. App. A12-A17) and judgments (Pet. App. A18-A23, A24-A28) of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1991. A petition for rehearing was denied on January 30, 1992. Pet. App. A29-A31. The petition for a writ of certiorari was filed on

April 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners were successful bidders in timber sales conducted by the Forest Service under the National Forest Management Act of 1976, 16 U.S.C. 472a. See also 36 C.F.R. Pt. 223. The resulting contracts required petitioners to cut, remove, and pay for timber by specified times.

In the early 1980s, petitioners and other Pacific Northwest timber purchasers encountered financial problems that made it difficult for them to meet the contract deadlines. To address that situation, in December 1983 the Forest Service adopted the Multi-Sale Extension Program (MSEP), 48 Fed. Reg. 54,812 (1983). Pet. App. A3-A4; see also *Sierra Pacific Indus.* v. *Block*, 643 F. Supp. 1256, 1262-1265 (N.D. Cal. 1986), aff'd in part, rev'd in part, 866 F.2d 1099 (9th Cir. 1989). Under the MSEP, qualified purchasers could obtain more time to complete certain timber-sale contracts by submitting plans containing new work schedules for Forest Service approval. The deadline for submission of MSEP plans was February 15, 1984. 48 Fed. Reg. at 54,814; Pet. App. A34. Petitioners did not file any MSEP plans prior to that deadline.

b. Meanwhile, in April 1983, one of the private timber companies that had contracted to buy timber from the Forest Service brought suit to prevent the Forest Service from enforcing the contracts. *North Side Lumber Co.* v. *Block*, Civ. No. 83-490BU (D. Or.). North Side argued that "contingencies unforeseen at the time the [timber] contracts were made render[ed] the contracts void under the contract law doctrines of commercial impracticability, frustration

of purpose, and impossibility of performance." *North Side Lumber Co.* v. *Block*, 753 F.2d 1482, 1484 (9th Cir.), certs. denied, 474 U.S. 919 and 474 U.S. 931 (1985). North Side sought injunctive relief on behalf of a class of private timber companies.

In February 1984, the district court in *North Side* entered a preliminary injunction barring the Forest Service from "enforcing in any manner" certain timber contracts held by members of a conditionally certified class that included petitioners. Pet. 4; see Pet. App. A4. The injunction also barred the Forest Service "from enforcing the current February 15, 1984 deadline for the submission" of an MSEP plan by any class member who "could include one or more of those [timber-sale contracts] * * * in such a plan." Pet. 4.

c. The Ninth Circuit vacated and remanded, holding that, under the constraints of the Little Tucker Act, 28 U.S.C. 1346(a)(2), the district court lacked subject matter jurisdiction over North Side's impracticability claim. *North Side Lumber Co.* v. *Block*, 753 F.2d 1482, 1484-1486 (9th Cir. 1985). The court also held that, because the injunction was "based on the impracticability claim," the injunction should be vacated. *Id.* at 1486. It remanded for further proceedings on the statutory claims raised by several publicly held timber companies that had intervened as plaintiffs. *Ibid.*; see also *id.* at 1483, 1484 n.2.

The Ninth Circuit issued its opinion on February 20, 1985. *North Side*, 753 F.2d at 1482. The court stayed its mandate, however, pending a petition for rehearing and subsequent petition for certiorari. As a result, the Ninth Circuit's mandate in *North Side* did not issue until November 28, 1985, after this Court denied certiorari. *Bohemia, Inc.* v. *Block*, 474

U.S. 919 (Oct. 21, 1985); *North Side Lumber Co.* v. *Block*, 474 U.S. 931 (Oct. 21, 1985).[1]

d. In early May 1985, after receiving the Ninth Circuit's adverse decision in *North Side*, petitioners for the first time submitted MSEP plans to the Forest Service, seeking to extend the performance deadlines for their timber-sale contracts. The Forest Service delayed action on the plans in light of "the uncertainties of the current court action," Pet. App. A14; see also *id.* at A5.[2] In mid-May 1985, the *North Side* plaintiffs asked the district court to issue an order requiring the Forest Service to show cause why it should not be held in contempt. They contended that the Forest Service had violated the preliminary injunction by failing to act on their MSEP plans. Gov't C.A. Br. 13 & n.14. The district court never ruled on the show-cause motion. Thus, there was never a judicial determination that the Forest Service had violated the injunction or that the Forest Service should be held in contempt.

e. Immediately after this Court denied certiorari in *North Side*, the government reached a settlement with most of the *North Side* plaintiffs. The settlement provided for approval of MSEP plans filed by those plaintiffs who agreed to the settlement terms. Because petitioners did not agree to the settlement

---

[1] After the Ninth Circuit granted a stay of mandate pending the *North Side* plaintiffs' petition for certiorari, the Forest Service applied to this Court for an order vacating the stay. That application was denied on July 24, 1985, by then-Justice Rehnquist, sitting as Circuit Justice, in *Block* v. *North Side Lumber Co.*, 473 U.S. 1307.

[2] Petitioners resubmitted their MSEP plans in December 1985, after the *North Side* injunction was dissolved. The Forest Service declined to approve those plans on the ground that they were untimely. Pet. App. A5.

terms, their plans were not approved. Some eight months after the Ninth Circuit issued its mandate in *North Side*, thereby dissolving the preliminary injunction, the district court dismissed petitioners from the class action for failure to prosecute. Gov't C.A. Br. 14-15.

2. The existing performance deadlines in petitioners' timber-sale contracts, absent their extension, eventually expired. In 1986 and 1987, the Forest Service declared petitioners in default; it later terminated their contracts and resold the timber in some of the contracts to others. Pet. 6 & n.3; Pet. App. A5. In addition, as a condition for awarding new timber-sale contracts to petitioners, the Forest Service required them to post surety bonds in higher amounts.

3. The instant petition concerns two actions, consolidated on appeal, that were commenced after the Ninth Circuit's decision in *North Side*.[3]

The first action was commenced by petitioner Hampton Tree Farms in June 1985. *Hampton Tree Farms, Inc.* v. *Block*, Civil No. 85-1085-BU (D. Or.). In that case, Hampton sought an order requiring the Forest Service to approve its MSEP plan and thus extend

---

[3] While these two cases were pending in the district court, petitioners also sought approval of their MSEPs by administrative means. In May 1989, the Associate Deputy Chief of the Forest Service determined that the *North Side* injunction did not grant class members "the right to submit MSEP's during its pendency," and that even if it did, after its "dissolution * * * for want of jurisdiction, the injunction did not continue to provide [petitioners] * * * any rights." C.A. App. 180. Accordingly, he concluded that "the MSEP's submitted by [petitioners] after the February 15, 1984, deadline established by the final Multi-Sale Extension Policy were untimely." *Ibid.*

its contract deadlines. In April 1987, the district court granted summary judgment in favor of Hampton and directed the Forest Service to "accept and approve Hampton's Multi-Sale Extension plan." Pet. App. A17. In the court's view, Hampton's plan was timely because it was filed before the *North Side* injunction "was dissolved in November, 1985." *Ibid.* In March 1990, the district court denied the Forest Service's motion to alter or amend the judgment and entered final judgment in favor of Hampton. *Id.* at A18-A23.

The second action was commenced in December 1987, when petitioner Suntip Co. filed a substantially similar complaint requesting similar relief against the Forest Service. *Suntip Co.* v. *Yeutter*, Civ. No. 87-1360-JMB (D. Or.). In June 1990, the district court entered a final judgment in favor of Suntip virtually identical to the final judgment entered in Hampton's action.

In each case, the district court held that the MSEP was timely filed because it was filed before the *North Side* injunction was dissolved by the issuance of the Ninth Circuit's mandate. Pet. App. A20, A26. Based on that holding, the court further held that (1) petitioners were entitled to extensions of their contracts; (2) they were not in default under any of the contracts; (3) the Forest Service breached the contracts by terminating them; (4) termination of the contracts or resale of the timber by the Forest Service entitled petitioners to cancel the contracts without liability; and (5) the requirements and remedies normally imposed on defaulting purchasers, such as enhanced bonding requirements, could not apply to petitioners. *Id.* at A20-A22, A26-A28.

4. The Ninth Circuit reversed, agreeing with the Forest Service's contention that "in issuing [the] judgment for [petitioners] * * *, the district court was retroactively enforcing a void injunction." Pet. App. A6. The "lesson" that the court of appeals derived from case law was that "once an injunction in a civil case has been invalidated, rights granted under the injunction no longer exist and cannot be enforced." *Id.* at A7. Applying the precedent here, the court held that "[petitioners] cannot rely on the voided injunction to justify filing their MSEP plans after the February 15, 1984, deadline." *Id.* at A9. The court observed that "[r]ather than seeking contract extensions in a timely fashion, [petitioners] elected to take a chance on an invalid injunction." *Ibid.* The court concluded that "[t]he district court had no authority to rewrite the Forest Service MSEP to accommodate contractors who had rejected the MSEP deadline while waiting to see how the injunction fared on appeal." *Ibid.*[4]

---

[4] The court of appeals also decided other issues adversely to petitioners, which are not raised in this Court. The district court had held that "policies of the Forest Service * * * adapting to the existence of the *North Side* injunction were not thereafter changed in accordance with requirements of law, thereby rendering unenforceable any changes to such policies otherwise attempted." Pet. App. A26. The court of appeals rejected the district court's "assumption that, in complying with the [*North Side*] injunction, the Forest Service had adopted an agency rule," *id.* at A9, that could, in turn, be changed only by formal rulemaking proceedings, *id.* at A10. The court of appeals observed that the "February 15, 1984, deadline was the only one ever published in the Federal Register" by the Forest Service, and, consequently, that "the Forest Service's rejection of * * * [petitioners'] MSEP plans due to lateness could not have been the result of an improperly created or modified agency rule." *Ibid.* The district court had

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly held that the void *North Side* injunction provided no basis for requiring the Forest Seervice to approve petitioners' untimely MSEP plans. At the time the district court imposed that requirement, the *North Side* injunction had long since been dissolved and the *North Side* case dismissed. Thus, as the court of appeals observed, the district court's ruling amounted to the "retroactive[] enforc[ement]" of a "void injunction." Pet. App. A6. As such, the district court's ruling violated established principles and was properly reversed.

"The right to remedial relief falls with an injunction which events prove was erroneously issued, * * * and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court." *United States* v. *United Mine Workers*, 330 U.S. 258, 295 (1947). In accordance with that principle, this Court has held that "if a district court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void and an order of civil contempt based on refusal to honor it must be reversed." *United States Catholic Confer-*

---

also held that the Forest Service was "estopped from denying the full force and effectiveness of the *North Side* injunction." *Id.* at A11 (quoting *id.* at A26). The court of appeals held that because "the *North Side* injunction was issued without jurisdiction and was held on appeal to be void," the court did not need to decide "what relevance, if any, the doctrine of estoppel bears to this case." *Id.* at A11.

ence v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); see also *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 451-452 (1911).[5]

Although most decisions applying the principle that a void injunction cannot be enforced concern orders of civil contempt, the principle is not limited to that context. For example, in *Zeilstra* v. *Tarr*, 466 F.2d 111, 112-113 (6th Cir. 1972), the plaintiff sought an order requiring the Selective Service to reclassify him for purposes of draft eligibility; he relied on an injunction entered in a separate class action that was vacated on appeal for lack of subject matter jurisdiction. See *Gregory* v. *Tarr*, 436 F.2d 513 (6th Cir.), cert. denied, 403 U.S. 922 (1971). The Sixth Circuit in *Zeilstra* rejected the plaintiff's reliance on the void injunction, stating that the prior injunction "had no validity initially and certainly [had] no[ne] after we had reversed and set it aside." 466 F.2d at 113.[6]

---

[5] Accord *United Elec. Workers* v. *163 Pleasant Street Corp.*, 960 F.2d 1080, 1084 (1st Cir. 1992) ("Given that civil contempt is designed to coerce compliance with the court's decree, it is logical that the [contempt] order itself should fall with a showing that the court was without authority to enter the decree") (quoting *Willy* v. *Coastal Corp.*, 112 S. Ct. 1076, 1081 (1992)); *Tekkno Laboratories, Inc.* v. *Perales*, 933 F.2d 1093, 1098-1099 (2d Cir. 1991); *In re U.S. Catholic Conference*, 885 F.2d 1020, 1023, 1031 (2d Cir. 1989) (holding, on remand from this Court, that district court lacked subject matter jurisdiction over suit, and thus could not issue subpoenas *duces tecum* to non-parties and could not enforce them by civil contempt sanctions), cert. denied, 495 U.S. 918 (1990).

[6] Accord *Sandler* v. *Tarr*, 345 F. Supp. 612, 621-622 (D. Md. 1971) (rejecting similar claim based on same injunction, stating "[i]t is one thing to say that [a former injunction]

The principle underlying *Zeilstra* and the other decisions cited above applies with full force in the present case. In contrast to the decisions concerning civil contempt, there was no judicial determination in this case that the Forest Service had violated the *North Side* injunction or that any remedial purpose could be served by an order of civil contempt. Cf. *Gompers*, 221 U.S. at 441, 451. Moreover, as the court of appeals recognized, petitioners sought a remedy for a situation of their own making: the termination of their contracts stemmed from petitioners' decision to "take a chance on an invalid injunction," "[r]ather than seeking contract extensions in a timely fashion." Pet. App. A9. The court of appeals properly concluded that "[t]he district court had no authority to rewrite the Forest Service MSEP to accommodate contractors who had rejected the MSEP deadline while waiting to see how the injunction fared on appeal." *Ibid.*

Petitioners nonetheless insist that an "extra-jurisdictional preliminary injunction is not a nullity" but "has consequences." Pet. 9. At most, such "consequences" relate to possible criminal contempt and other sanctions issued while an injunction is in effect. Thus, criminal contempt sanctions generally survive the invalidation of the underlying injunction. See *Willy* v. *Coastal Corp.*, 112 S. Ct. at 1080; *Catholic Conference*, 487 U.S. at 78-79; *United States* v. *Mine Workers*, *supra*; *In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 725-726 (9th

---

* * * must be obeyed before it is dissolved[;] [i]t is quite another thing to say that relief may now be based on the fact that [it] * * * had existed at an earlier time"), aff'd, 463 F.2d 1096 (4th Cir.) (per curiam), cert. denied, 409 U.S. 990 (1972); see also *Pasquier* v. *Tarr*, 444 F.2d 116, 117 (5th Cir. 1971).

Cir. 1989); but cf. *In re Providence Journal Co.*, 820 F.2d 1342, 1347, 1353 (1st Cir. 1986) (criminal contempt sanctions unenforceable if imposed to enforce a "transparently invalid" injunction or "entered by a court clearly without jurisdiction over the contemnors or the subject matter"), cert. dismissed, 485 U.S. 693 (1988). But this Court has made clear that a different rule applies to the "right to remedial relief"; that right "falls with [the] injunction." *Catholic Conference*, 487 U.S. at 79 (quoting *United States* v. *Mine Workers*, 330 U.S. at 294-295).

The differing rules for criminal and civil contempt orders reflect the "different purposes and necessities of the two types of orders." *Catholic Conference*, 487 U.S. at 79. A criminal contempt order is intended to punish the contemnor and vindicate the authority of the court; a civil contempt order is intended to provide relief to the party who obtained the underlying injunction by ordering the contemnor to pay fines or to comply with the injunction. *Gompers*, 221 U.S. at 441-443. Because the present case concerned petitioners' right to relief under a void injunction, and not an order imposing punitive sanctions, petitioners' reliance on decisions applying the rule for criminal contempt is misplaced.[7]

For similar reasons, petitioners err in relying on *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447, 2455-2456 (1990), and *Willy* v. *Coastal Corp.*, 112

---

[7] Thus, *United States* v. *Shipp*, 203 U.S. 563 (1906), cited at Pet. 9, is inapposite. *Shipp* held that a state official—who was accused of allowing a mob to lynch a prisoner he was ordered to protect while the prisoner's habeas corpus petition was under review in the federal courts—could be tried for criminal contempt in a federal court.

S. Ct. at 1080-1081. Those decisions concerned punitive sanctions imposed under Fed. R. Civ. P. 11. In holding that orders imposing Rule 11 sanctions survived the voluntary dismissal (in *Cooter & Gell*) and the dismissal for lack of subject matter jurisdiction (in *Willy*) of the underlying action, the Court relied on its decisions concerning criminal contempt sanctions and distinguished its decisions concerning civil contempt orders. In *Cooter & Gell*, the Court wrote that "[l]ike the imposition of * * * [criminal] contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits [but instead] * * * requires the determination of a collateral issue." 110 S. Ct. at 2456. In *Willy*, the Court distinguished *Catholic Conference* on the ground that "[a] civil contempt order [such as that involved in *Catholic Conference*] has much different purposes than a Rule 11 sanction." 112 S. Ct. at 1081. The Court in *Willy* explained:

> Rule 11 is designed to punish a party who has already violated the court's rules. * * * Given that civil contempt is designed to coerce compliance with the court's decree, it is logical that the order itself should fall with a showing that the court was without authority to enter the decree.

Ibid. (citing *Cooter & Gell* and *United States* v. *Mine Workers*).

The distinction drawn in *Cooter & Gell* and *Willy* between punitive sanctions designed to punish an abuse of the judicial process, on the one hand, and remedial orders designed to effectuate a decree, on the other, supports the decision of the court of appeals in this case. The only meaningful distinction between the present case and *Catholic Conference* is that,

unlike the plaintiff in *Catholic Conference*, petitioners did not even have an order of civil contempt to rely upon in seeking relief; they relied solely on an injunction entered by a court that "was without authority to enter [it]" (*Willy*, 112 S. Ct. at 1081). Thus, petitioners cannot make even a colorable claim that some process independent of the void injunction exists to be enforced. Accordingly, the Court's decision in *Catholic Conference*, as explained in *Willy*, compelled the conclusion that petitioners' right to relief expired with the dissolution of the *North Side* injunction.[8]

---

[8] Petitioners' reliance (Pet. 12-13 & n.7) on *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940), and *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938), is unavailing. Those decisions held that final, unappealed decisions of federal courts, later deemed in excess of jurisdiction, were nonetheless *res judicata* and thus immune from collateral, though not direct, attack. See *Willy*, 112 S. Ct. at 1080 (discussing *Chicot County* and *Stoll*). That holding is inapposite here, because the *North Side* injunction was directly and successfully attacked on appeal to the Ninth Circuit. *North Side Lumber*, 753 F.2d at 1486.

Littell v. *Morton*, 369 F. Supp. 411, 419-420 (D. Md. 1974), aff'd, 519 F.2d 1399 (4th Cir. 1975) (Table), cited at Pet. 14, is likewise inapposite. In *Littell*, an attorney had obtained an injunction in a prior case, later set aside on appeal, that barred his employer from terminating his contract to provide legal services. While the injunction was in effect, the attorney rendered competent, professional services to his employer. The court in *Littell* exercised its equitable powers to award restitution to the attorney for the benefits he provided to his employer during the life of the injunction. As the court of appeals in the instant case recognized, *Littell* was based "on a theory of restitution." Pet. App. A8. Petitioners fail to identify, and we do not discern, any benefit they conferred on the Forest Service during the life of the *North Side* injunction that would justify the relief they sought—even if we assume, *arguendo*, that such an equitable theory could ever

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROGER CLEGG
Acting Assistant Attorney General

JOHN A. BRYSON
DIRK D. SNEL
Attorneys

JUNE 1992

---

support a judicial order barring an agency from applying an otherwise valid deadline set forth in published regulations. See *OPM* v. *Richmond*, 110 S. Ct. 2465 (1990).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45481